UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

NYACK HOSPITAL
Employer

- and - **CASE NO. 2-RC-23255**

1199 SEIU, UNITED HEALTHCARE WORKERS EAST
Petitioner

DECISION AND DIRECTION OF ELECTION

Nyack Hospital is an acute care hospital that currently has collective-bargaining agreements with four different unions that represent six certified units. Specifically, the Employer has recognized: the New York State Nurses Association representing the nursing staff; Local 30, International Union of Operating Engineers, representing skilled maintenance employees from various trades; Communication Workers of America, Local 1103, ("CWA") representing technical employees in certain departments; and, 1199 SEIU, United Healthcare Workers East, representing three certified units. In the instant case, 1199 SEIU, United Healthcare Workers East, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. This petition seeks to include three histology technicians[1] in the existing service and maintenance unit.

[1] The parties stipulated that these three employees are the only unrepresented non-professional employees employed by the Employer.

Upon the petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter[2] and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that Nyack Hospital, herein the Employer, is a not-for-profit, acute care hospital, with an office and place of business located at 160 Midland Avenue, Nyack, New York, the sole facility involved herein. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $250,000, and purchases and receives at it Nyack, New York facility, goods and materials valued in excess of $50,000, from firms located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that, 1199 SEIU, United Healthcare Workers East, herein Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

[2] The brief filed by the Employer herein has been duly considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. Petitioner seeks to add the three unrepresented histology technicians to its service and maintenance unit. As evidenced at the hearing and in the Employer's brief, the parties disagree on several procedural issues, such as, whether the petition should be dismissed as barred by a prior election or barred by either a CWA contract or a memorandum of agreement with Petitioner. Also, the Employer asserts that the Region had failed to serve the CWA with notice of the proceeding. Substantively, the parties have framed the issue as whether the petitioned-for employees constitute an appropriate stand-alone unit or whether the employees should accrete to one of the existing units and if so, which one.

Petitioner contends that the histology technicians/technologists ("techs") should accrete to the service and maintenance unit that it already represents, which is comprised, in part, of laboratory techs. Petitioner claims that the parties effectively amended the recognition clause of the master contract to include certain laboratory techs in a non-conforming unit of service and maintenance employees and that the three histology techs petitioned-for here should accrete to that unit.

With respect to the procedural issues, Petitioner, contrary to the Employer's assertion, notes that the histology techs were specifically excluded from the professional unit that it sought in a previous petition filed in Case No. 2-RC-23213. Because the histology techs did not have the opportunity to vote, that election cannot bar the instant petition, even though, it was conducted within the last twelve months preceding the filing of the instant petition. See *S.S.. Joachim & Anne Residence*, 314 NLRB 1191 (1994) and *Philadelphia Co.*, 84 NLRB 115 (1949). Similarly, Petitioner contends that the histology

techs were specifically excluded from the CWA contract and, therefore, that contract cannot bar the instant petition.

The Employer argues that because the histology techs are "technical" employees, accretion to any unit, other than the technical unit represented by CWA, is inconsistent with the Board's health care rules on unit placement.[3] Further, the Employer contends that the current CWA contract is a bar to the instant petition. Alternatively, the Employer argues that the histology techs should accrete to the recovery center unit which is comprised of case managers and the coordinators for men's and women's health services. The Employer contends that this unit constitutes the "residual" unit of the Employer's employees and argues that since the residual employees are already covered by a contract, they cannot vote in an election pursuant to the instant petition. Consequently, the Employer argues that because an election among just a few residual employees and not the entire unit of residual employees is inappropriate, the instant petition should be dismissed. Finally, the Employer argues that the petition constitutes an effort to create undue proliferation of bargaining units. Currently, as mentioned above, the Employer bargains with four different unions representing six units. The Employer maintains that the instant petition would create yet another stand-alone bargaining unit of just three employees.

I have considered the evidence and the arguments presented by the parties on these issues, and as discussed below, I find that the unit petitioned-for by the Petitioner is not barred by a prior election or by other collective-bargaining agreements concerning different classifications of employees. Further, I find that the petitioned-for unit shares a sufficient community of interest with the employees already represented by Petitioner and therefore direct a self-determination election among this group of voters. To provide a context for my discussion, I will first provide an overview of the Employer's operations.

[3] The parties stipulated that histology techs are technical employees.

I. CERTIFIED UNITS AND THE RELEVANT COLLECTIVE-BARGAINING AGREEMENTS

On February 15, 2002, the Board issued a certification of representative pursuant to the results of a stipulated election, authorizing Petitioner as the representative of Laboratory Corporation of America Holdings ("Lab Corp.") employees in the following unit: all full-time and regular part-time and per diem professional employees, including technicians and technologists, employed at the Employer's facility[4].

On June 14, 2002, the Board issued a certification of representative pursuant to the results of a stipulated election, authorizing Petitioner as the representative of the Employer's employees in the following unit: all full-time and regular part-time and per diem non-professional employees ("service and maintenance unit"). The parties entered a collective-bargaining agreement effective by its terms from December 1, 2002, to May 31, 2007, ("2002-2007 master contract"). In an undated letter attached to the master contract, Employer attorney, Richard Cooper, informed Petitioner's president, Dennis Rivera, that the Employer will hire all of the employees of Lab Corp. who were represented by Petitioner. Further, the Employer stated that "the employees transferred are to be fully covered by the [master contract]" between Petitioner and the Employer. The parties jointly submitted a handwritten memorandum of agreement dated June 4, 2007, which extends the terms of the master contract from June 1, 2007, to September 30, 2011, and contains eight modifications to the master contract.

On July 17, 2003, the Board issued a certification of representative pursuant to the results of a stipulated election, authorizing Petitioner as the representative of the Employer's employees in the following unit: all full-time and regular part-time and per diem clerical employees ("business office clerical unit"). On January 20, 2004, the parties

[4] The record does not reveal whether Lab Corp. and Petitioner subsequently entered a collective-bargaining agreement covering this unit.

agreed to a memorandum of agreement for the business office clerical unit, which states that the terms and conditions of the 2002-2007 master contract apply to this unit, in addition to the terms set forth therein. The record is unclear whether the above-mentioned, handwritten memorandum of agreement effective from 2007-2011, applies to the business office clerical unit.

On May 12, 2006, the Board issued a certification of representative pursuant to the results of a stipulated election, authorizing Petitioner as the representative of the Employer's employees in the following unit: all full-time and regular part-time case managers and coordinators in the recovery center ("recovery center unit"). The parties jointly submitted an unsigned, undated memorandum of agreement, which sets forth the terms and conditions applicable to the employees in the recovery center unit. The memorandum of agreement does not contain a duration clause, but references the 2002-2007 master contract. The record is unclear whether the above-mentioned, handwritten memorandum of agreement effective from 2007-2011, applies to the recovery center unit.

Finally, pursuant to a stipulated election agreement in Case No. 2-RC-23213 entered into by the parties, an election was conducted on September 25, 2007, in the following unit of employees: all full-time and regular part-time professional employees, including clinical dieticians, MICA specialists, medical social workers, clinical case managers, staff pharmacists, medical technologists, physical therapists, speech pathologists, intake coordinators, and hospital/home care liaisons, and excluding all other employees. On October 11, 2007, the Region certified that a majority of the valid ballots had not been cast for Petitioner in the unit, as set forth above. The record fails to establish that the histology techs were eligible to vote in this election.

Concerning the CWA unit, the collective-bargaining agreement between CWA and the Employer, effective by its terms from July 1, 2001, to June 30, 2004, and extended by memorandum of agreement to June 30, 2012, covers all technical employees in the

following departments: nursing, rehabilitation, radiology, respiratory care, EEG and EKG; and excludes, among others, histology technologists, histology laboratory assistants, phlebotomists, lead laboratory assistants, laboratory assistants, laboratory aides, medical technologists, cytotechnologists, pathologist assistants, and the blood bank donor coordinators in the laboratory department.

II. TERMS AND CONDITIONS OF EMPLOYMENT

Alice Vallen Cronin, the administrator for information services, is responsible for the following departments: laboratory, the blood bank, pathology, histology, medical records, information technology and the medical library. Section chief, Theresa Rohr, reports to Vallen and Dr. Walker, a pathologist. Rohr supervises the histology techs, whereas, the former "Lab Corp." employees, who work in near proximity, are separately supervised by a line of Lab Corp. managers, Linda Albert, Hiam Yacku and Mary Ann Chima. A third group of employees, known as the patient service center, also work in the laboratory. The patient service center employees are directly employed by Lab Corp. and no evidence was adduced regarding the supervisory structure to whom these employees report. The histology techs receive benefits, such as, health insurance, pension, vacation and annual leave, which are determined by the Employer.

Medical technologist Lolita Haranan has been employed in the Employer's laboratory for the past twenty-eight years. While the employing entity has shifted between the Employer and Lab Corp. and back again, Haranan's job duties and work location have remained constant. The laboratory consists of one room where various tests are performed by two technicians, twenty-eight technologists and a lab aid, all of whom are represented by Petitioner, except the histologists. The open floor plan specifies several long counters where the techs perform their work at different stations, such as, the blood bank, hematology, chemistry, histology and microbiology. While the hematology and

chemistry techs do not rotate through stations with the histology techs, the employees work in an open area and have direct access to each other.

Haranan works four-day weeks and rotates through weekends so that her schedule is either Sunday through Wednesday, or Monday through Thursday. No testimony was adduced regarding the typical schedule of the histology techs. All of the lab techs wear either scrubs or a lab coat.

Ana Luisa Vazquez has worked for the Employer as a histology tech for the past seven years. Her job duties include primarily processing tissue in the lab, alongside all of the other lab employees. Vasquez maintained that while there is daily interaction among the employees, some of her work requires the use of large machines located in a separate room. Generally, she works in the lab in the morning and in the afternoon, she shuttles back and forth between the lab and the room designated for the large machines. She confirmed that the other classifications of employees in the lab do not fill in for the histology techs; instead, histology supervisor, Theresa Rohr, covers the work.

III. ANALYSIS

Where there is already an existing unit, and additional employees are being organized, a separate unit might be appropriate, or the Board may appropriately order an *Armour-Globe* self-determination election in which employees choose either to be included in an existing unit or remain unrepresented. *See, e.g., NLRB v. Raytheon, Co.,* 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). Where, as here, an incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization is involved, the Board may order a self-determination election. *Warner-Lambert Co.,* 298 NLRB 993 (1990); *Mount Sinai Hospital,* 233 NLRB 507 (1977); *St. John's Hospital,* 307 NLRB 767 (1992). In addition, even where unrepresented employees could constitute an

appropriate unit by themselves, a self-determination election can be appropriate. *Ward Baking Co.,* 139 NLRB 1344, 1350 (1962).

Here, not only does the Employer claim that a separate unit would create an undue proliferation of units, Petitioner's stated preference is that the three histology techs be combined with the service and maintenance unit which encompasses the "Lab Corp." techs. Further, the parties stipulated that the histology techs are the only unrepresented non-professional employees employed by the Employer. Accordingly, the appropriateness of the histology techs as a voting group in a self-determination election does not appear to be in dispute. Thus, the only issue for decision is whether the petitioned-for employees share a community of interest with the employees in the existing unit. *See, e.g. Warner-Lambert Co.,* 298 NLRB 993 (1990); *Capital Cities Broadcasting Corp.,* 194 NLRB 1063 (1972).

Community of interest factors may include the nature of employee skills and functions, the degree of functional integration, interchangeability and contact among employees, common work situs, common supervision, geographic separation, and commonalities in general working conditions. *See, e.g., Seaboard Marine Ltd.,* 327 NLRB 556 (1999) (nature of employee skills and functions); *Atlanta Hilton & Tower*, 273 NLRB 87 (1984) (degree of functional integration); *J.C. Penny Co.,* 238 NLRB 766 (1999) (interchange and contact among employees); *Allied Gear & Machine Co.,* 250 NLRB 679 (1980) (general working conditions) *R-N Market*, 190 NLRB 292 (1971) (work situs); *Sears, Roebuck & Co.,* 191 NLRB 398 (1971) (common supervision). Functional integration is not limited to the matter of employee contacts, but also concerns the interrelation of the actual operations of the facilities. *Bry-Fern Care Center, 21 F.3d 706, 710* (1993). In addition, the Board may reasonably find employees to share common supervision when a central administration or personnel office is involved setting personnel policies and performing personnel functions, even where employees have separate direct

supervisors and separate divisions make separate decisions about hiring and firing of employees. *Presbyterian Medical Ctr.,* 218 NLRB 1266, 1268 (1975).

The absence of a particular community of interest factor will not require a finding of lack of community of interest. For instance, the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is a sufficient community of interest among all employees. *Berea Publishing Co.,* 140 NLRB 516, 518 (1963). The fact that employees receive different wages and benefits and may work different hours is not an adequate basis by itself for exclusion from the unit. *K.G. Knitting Mills*, 320 NLRB 374 (1995); *Armour & Co.,* 119 NLRB 122 (1958). Difference in supervision is not a per se basis for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co.,* 88 NLRB 631 (1950); *Warner-Lambert Co.,* 298 NLRB 993, 994 (1990). An absence of employee contact does not eliminate community of interest where employees remain functionally integrated. *Bry-Fern Care Center, Inc.,* 21 F.3d 706, 710 (1994), (following *Presbyterian Medical Ctr.,* 218 NLRB 1266 (1975)). Rather than any specific criteria, it is the general interests, duties, nature of work and working conditions of the employees that are significant in resolving questions concerning an appropriate unit. *Kansas City Power & Light Co.,* 75 NRLB 609 (1948).

Further, in assessing community of interest, no single factor need receive more weight than another; rather, the Board should review the factors as a whole in determining whether sufficient community of interest exists between employees. *Hotel Services Group, Inc.,* 328 NRLB 116 (1999). Finally, in determining an appropriate unit, a petitioner's desire is a relevant consideration and can be relied on in conjunction with other factors, but may not be the dispositive consideration. *See, e.g., Huckleberry Youth Programs,* 326 NLRB No. 1272 (1998); *Metropolitan Life Insurance Co.,* 156 NLRB 1408.

In the present case, it is clear that histology techs and the "Lab Corp." techs share many commonalities, including the basic nature and purpose of their work. Although there

is not a total integration of processes, the lab area is open and conducive to some interaction among the techs in processing specimens. While these groups are separately supervised, the record indicates that the histology techs receive the same benefits and are covered by the same policies applicable to all of the Employer's unrepresented employees. Moreover, the record does not explore whether the histology techs share a greater community of interest with some other group, such as the employees in the patient service center or the classifications covered by the CWA technical unit and, therefore, the evidence does not reflect that some other unit would be more appropriate or that the Board's designated unit is "clearly inappropriate." *Sohio Petroleum Co.,* 625 F.2d 223 at 226. Accordingly, I find that the employees in the proposed voting group share a sufficient community of interest with the existing service unit to warrant a self-determination election.

Regarding the Employer's claim that the histology techs must "accrete" to the CWA technical unit because they are technical employees, no evidence was adduced to establish that these groups share a community of interest. Further, Petitioner already represents a non-conforming unit of service and maintenance employees which includes technical employees. In that regard, the record demonstrates that while these units were previously certified as separate units, the parties appear to have merged the units by their conduct in recent negotiations for the current memorandum of agreement. *Raley's*, 348 NLRB No. 25 (2006). Accordingly, the Board's health care rules regarding unit placement do not apply where the parties have agreed to non-conforming units. Finally, having found that a self-determination election is appropriate, the Employer's reliance on accretion cases involving residual units are inapposite.

With respect to the procedural matters raised by the Employer, I find that the voting group in the instant case was excluded from voting in a prior election conducted on September 25, 2007, that involved full-time and regular part-time professional employees. Further, I find that none of the contracts between the Employer and the unions with which

it deals, bar the only unrepresented group of non-professional employees from voting in a self-determination election at issue here. Finally, the record demonstrates that the Region, via a facsimile transmission which reflects receipt, informed CWA of the pending petition and provided notice of hearing and an opportunity to intervene in the instant case. Notwithstanding this notice, CWA has not intervened in the instant matter.

In conclusion, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time histology technicians and technologists.
>
> Excluded: All other employees, and guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[5] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United

[5] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[6] Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes by 1199, SEIU, United Healthcare Workers East. If a majority of the employees in the voting group vote for representation, they will be taken to have indicated the desire to be included in the existing unit of service and maintenance employees currently represented by 1199, SEIU, United Healthcare Workers East. If a majority of the employees in the voting group vote against

[6] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **April 4, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

representation, they will be taken to have indicated the desire to remain unrepresented.[7]

Dated at New York, New York
this March 28, 2008

/s/

Celeste Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

[7] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **April 11, 2008.** The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.